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Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of Broadband PCS C and F Block Installment Payment Issues	)	WT Docket No. 97-82

To: The Commission
Attn: Sande Taxali

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The following comments are submitted pursuant to a request for comments issued by the Federal Communications Commission (the "Commission") in a Public Notice dated June 2, 1997, Docket 97-82, Release No. DA 97-679. In the Notice, the Commission requested comments on several proposals it had received for alternative financing arrangements for broadband Personal Communications Service ("PCS") C and F block licensees. The Commission also invited any additional proposals for addressing the C and F block broadband PCS financing terms.

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The law firm of Dewey Ballantine does not represent any PCS licensees before the Commission. Nevertheless, as a corporate law firm with an extensive transactional practice, we have an interest in ensuring that the Commission's rules and policies do not operate in a manner which prevents markets from rationalizing themselves, or which precludes companies from reorganizing to become more competitive.

We hope that the proposals contained herein offer constructive alternatives for the Commission that will enable it to ensure that the public interest is served. We support the Commission's efforts to adopt a consistent policy with respect to its licensees in the face of serial requests to modify the Commission's requirements for payments from entities licensed as C and F block licensees. In that regard, it is appropriate that the Commission consider alternative financing arrangements and restructuring plans.

As referenced in the Public Notice, the Commission received five separate proposals for alternative financing arrangements for C and F block licensees. These alternatives are summarized briefly below:

A. MCI:

MCI requested that the C block licensees be allowed to defer payment and accrue interest for the first five years of the license term; that the Commission modify the PCS ownership and attribution rules to encourage additional investment in C block licensees; and that such changes be available to all broadband PCS block licensees.

B. Fortunet:

Fortunet requested that the Commission suspend license payments until year five of the license term; extend the license term to 20 years; modify the C block control group rules; allow the transfer of C block licensees before the expiration of the five year holding period with modified unjust enrichment payments; and increase the level of foreign equity permitted.

C. Cook Inlet:

Cook Inlet ("CIRI") requested that the Commission initiate a rulemaking to establish the requirements and procedures for the disposition of the installment payment obligations of Commission licensees who obtained their licenses by competitive bidding; and that the Commission lift the stay of the deadline for broadband PCS C and F block installment payments.

D. General Wireless:

General Wireless requested that the Commission reduce the principal amount of its debt from an average C block price of $40/pop to $15/pop, consistent with A/B block prices.

E. ALPINE PCS, et al.:

ALPINE PCS, et al., requested that the Commission modify existing installment payment obligations by moving from a quarterly to an annual payment schedule.

We support the proposals of MCI and Fortunet, specifically, their suggestions that the Commission modify the PCS ownership and attribution rules to encourage additional investment in C block licensees; that the Commission increase the level of foreign equity permitted; that the Commission allow the transfer of C block licensees before the expiration of the five year holding period with modified unjust enrichment payments; and that such changes be available to all broadband PCS block licensees. We believe that each of these alternatives serves the public interest by increasing the pool of potential investors to which licensees can turn without increasing the (considerable) benefits that the Commission has already bestowed on C and F block licensees.

However, we question the need for the Commission to bestow yet additional benefits on such licensees by permitting them to postpone further making installment and other payments. In our view, such an approach only postpones the proverbial "day of reckoning" by permitting companies which may be under-capitalized to continue to attempt to compete in the PCS marketplace, without addressing the underlying problem of under-capitalization. Without adequate capital, these licensees would be capable of providing only nominal competition in the marketplace, with no guarantee that they would be in a better position to make scheduled payments at a later date.

Moreover, to the extent that the Commission decides to permit these licensees to postpone further making installment and other payments, it will be sending the wrong signals to future bidders for licenses at future auctions. Further postponement will only encourage irresponsible bidding by future bidders, who will have good reason to believe that the Commission will adjust its rules to compensate such bidders for overpaying for their licenses.

Additionally, pursuant to the Commission's request for other suggested approaches for addressing the C and F block broadband PCS financing terms, and in response to a specific suggestion from the Wireless Telecommunications Bureau staff, we submit the following two proposals.

Proposal I: Buy-outs

The limitations of the Commission on the ownership of a C block licenses in PCS complicate substantially the ability of a large entity, with revenues in excess of $125 million and assets in excess of $500 million, to obtain more than a minority holding in a U.S. C block PCS licensee. Accordingly, the C block licensees that are in financial difficulty have only a limited pool of investors from which to draw in order to obtain necessary capital resources.

In order to help remedy this situation, and assure that the public such licensees, we propose that the Commission allow a C block licensee, who is in financial difficulty and unable to meet its license payments, to be purchased outright by a large entity, with revenues of more than $125 million and total assets of more than $500 million at the time of purchase, under the following conditions:

(1) that the purchaser pay off the total amount owed to the Commission for the subject license immediately upon consummation of the transaction;

(2) that all benefits enjoyed by the original C block licensee be extinguished immediately upon consummation of the transaction; and

(3) that the transaction is otherwise in accordance with all Commission rules and regulations.

This proposal benefits the public. It allows an under-capitalized licensee to become adequately capitalized, thereby increasing and enhancing its ability to provide service to the public. The public, which is comprised of taxpayers, is also served inasmuch as the proposal provides for the immediate up-front payment of all monies owed to the Commission, making the Commission whole for the licensee's debt at the outset of the transaction. In this regard, the proposal properly transfers the risk of the future performance of the licensee from the Commission to the licensee, its owners, and other creditors. Finally, this proposal benefits the public as it will allow for uninterrupted service and enhanced competition in the PCS service.

In addition, this proposal benefits the market, by increasing access to capital markets and attracting a larger pool of investors for C block service providers. At the same time, as a non-small business or non-entrepreneurial entity, the large purchaser would surrender the benefits specially reserved for those types of entities in the C block upon purchase. Accordingly, the entity would not be unjustly enriched in this regard. In fact, given the amounts of the winning bids for many C block licenses, it is likely that any entity buying out a C block licensee according to the terms of this proposal will have paid a premium price, while foregoing any of the corresponding benefits that may have justified a higher bid price.

This proposal was designed as an alternative to a suggestion alluded to in the filing by Cook Inlet. CIRI alludes to the Commission attempting to reclaim a license, holding another auction, and selecting a new licensee. In our view, such an approach is fraught with problems. First, to the extent that the Commission can claim successfully that it has a security interest in the license (something it has historically denied to other, non-governmental, creditors) any attempt to reclaim a license will invite lawsuits by the other creditors of the licensee. Moreover, there is at least some likelihood that the Commission will be enjoined from reauctioning the license, thereby delaying service to the public.

Even if the Commission is successful in reauctioning the license, a successful new licensee is unlikely to bid as much as the original licensee, particularly if there is a cloud over the license resulting from litigation. Thus the taxpaying public will be denied the payment it otherwise would have obtained from the original licensee. If the result of an effort by the Commission is delay in delivery of service to the public, and substantially lower bid prices, it is difficult to determine how the public is served by such an effort.

The "buy out" proposal outlined above suffers from neither of these infirmities. It would expedite the delivery of service to the public by an adequately capitalized competitor, and it would result in the Commission receiving 100% of the monies owed by the licensee without the Commission bearing the risk of the future performance of the licensee in the marketplace.

Proposal II: Agency Agreements

Other than through direct investment, we suggest that agency agreements provide an alternative means that may allow for the continued operation of C block licensees in financial difficulty. In other contexts, Commission licensees have resorted to agency agreements as a substitute for outright ownership in order to respond to market imperatives without running afoul of the Commission's limitations.

For example, the Commission maintains numerical limitations on the ownership of mass media properties, both nationally and within local markets. The FCC has adjusted its limits from time to time, allowing companies to grow and acquire stations that put them at, or immediately below, the ownership caps.

However, to the extent that a licensee wants to increase its presence in a market without violating the Commission's ownership limitations, the industry has created a type of agency agreement which permits licensees to control other licensees in a manner which the Commission's limitations would otherwise preclude. In the radio and television business, this device is known as a "Local Marketing Agreement" or "LMA."

A Local Marketing Agreement is a contractual agreement between a radio or television licensee and another party (most often another radio or television licensee) under which the licensee permits the other party to program (and operate) the station, and sell the advertising time. While historically the Commission has maintained a policy that the licensee cannot "contract out" its obligations to operate in the public interest, the Commission's rules do not prevent a television licensee from entering into a seven day a week, 24 hour a day LMA.

Until recently, neither radio nor television LMAs were treated as attributable interests under the Commission's rules. Several years ago, and in response to questions from Congress, the FCC modified its rules so as to treat radio LMAs as attributable interests when determining compliance with local and national ownership limitations.

Nonetheless, based on the successful use of LMAs in the radio and television areas, we suggest that the Commission consider allowing the use of like arrangements in the PCS service. This would permit a C block licensee in financial difficulty to enter into an agency agreement with a large entity, with revenues in excess of $125 million and assets in excess of $500 million. Such an agreement would benefit the public by allowing a well-capitalized entity to construct and operate a network, thereby providing service to the public that, absent such an agreement, would not be provided. It would also benefit the large entity, enabling it to enjoy the same benefits that it would have enjoyed if it were permitted to acquire the license holder outright. At the same time, this proposal remains consistent with FCC restrictions and limitations on ownership of C block licenses, while providing a new source of capital to otherwise under-capitalized licensees.

It is not clear to us that the Commission's rules currently prohibit a C block licensee from entering into an agency agreement similar to a radio or television LMA. However, if the Commission agrees that such an agency agreement would enable distressed C block licensees to have access to an additional source of capital, in our view it would be preferable for the Commission to provide for such an agreement in its rules. This would provide potential parties to such agency agreements with the certainty that these agreements would not be found to be inconsistent with the Commission's policies at a subsequent date, and increase the likelihood that agency agreements could provide C block licensees in financial difficulty with an additional source of capital.

Respectfully submitted,

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